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No. ..-...
IN THE

Supreme Court of the United States

October Term, 1982

LOUIS TOM DRAGNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

WEITZMAN, FIDLER & RE,
HOWARD L. WEITZMAN,
DONALD M. RE,
9911 West Pico Boulevard,
Suite 1000,
Los Angeles, Calif. 90035,
(213) 277-8366,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Whether a conviction under 18 U.S.C. Section 1962(c) or (d) [RICO] can be based on predicate offenses of which a defendant has been acquitted or in which he was admittedly not involved.

2. Whether jury instructions are correct in a RICO conspiracy case which require the jury to find a conspiracy to commit the RICO predicate offenses, but not a conspiracy to commit a RICO substantive offense.

3. Whether the government must be bound by promises of immunity or confidentiality made by government investigators to a criminal suspect.

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LOUIS TOM DRAGNA,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Louis Tom Dragna petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below.

The opinion of the Court of Appeals [Appendix A, *infra*] is not yet reported.

Jurisdiction.

The Judgment of the Court of Appeals was entered September 3, 1982. A timely petition for rehearing and suggestion for rehearing en banc was filed September 16, 1982. The petition for rehearing and suggestion for rehearing en banc were denied November 1, 1982. [Appendix B].

An application for stay of mandate was granted by order filed November 17, 1982. [Appendix C]. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Statutes and Rules Involved.

The relevant provisions of the Racketeering Influenced and Corrupt Organizations Act [RICO], Title 18, U.S.C. Sections 1962(c) and 1962(d) are set forth in Appendix D.

Statement.

1. The petitioner Louis Tom Dragna was charged as one of five defendants in a five count indictment. Counts I and II charged a RICO conspiracy and substantive offense, respectively, under Title 18, U.S.C. Sections 1962(d) and 1962(c). Count III charged a Hobbs Act extortion under Title 18, U.S.C. Section 1951. Count IV charged an additional Hobbs Act violation, with which the petitioner Dragna was not charged. Count V charged an obstruction of justice under Title 18, U.S.C. Section 1510, through the murder of Frank Bompensiero, an informant.

After a seven week trial, the petitioner was acquitted on Counts II and V, and convicted on the RICO offenses in Counts I and II.

The petitioner was sentenced to two years in custody and a fine of $25,000.00. He remains at liberty to this date on bail on appeal, pursuant to a stay of mandate issued by the Ninth Circuit.

2. In an opinion filed September 3, 1982, the court below affirmed the petitioner's conviction and rejected a wide variety of claims of error. A timely petition for rehearing was denied. The court did grant petitioner a stay of mandate to permit the filing of this petition.

REASONS FOR GRANTING THE PETITION.

1. The question presented in this case concerning the ability of the government to rely as predicates to a RICO charge on offenses of which the defendant has been acquitted is an important and recurring one which has divided the Circuits. The opinion of the court below relies on offenses for which the petitioner was acquitted in determining the sufficiency of the evidence, and thus, permits extraordinary and irrational jury verdicts in future RICO prosecutions. As a result, review by this court is appropriate.

The petitioner was charged, and ultimately convicted, of a RICO conspiracy [18 U.S.C. Section 1962(d)] and RICO substantive [18 U.S.C. Section 1962(c)] offense.

The RICO conspirary [Count I] charged as predicate offenses the activities alleged in Count III [of which petitioner and all co-defendants were acquitted], Count IV [with which petitioner was not charged], Count V [of which petitioner and all co-defendants were acquitted], and the extortion of one Ruben Sturman.

The RICO substantive offense [Count II] charged as predicate offenses the same activities as Count II and an extortion from Sam Farkas, in which the government conceded the petitioner was not involved.

The court below rejected petitioner's argument that the evidence was insufficient to convict him because there was no sufficient evidence of his involvement in two predicate offenses as required by 18 U.S.C. Section 1961(5). Slip Opinion p. 19. In so doing the court cited the doctrine of inconsistent verdicts and *specifically relied* on the allegations of Counts III, IV, and VI [of which petitioner was acquitted or with which he was not charged] and the Farkas extortion in which he was uninvolved.

Without specifically saying so, the court resolved the question left open by the Ninth Circuit in *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980).

The position taken by the Ninth Circuit in the opinion below conflicts with that apparently taken in the Third Circuit. In *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978) the Third Circuit reversed a RICO conviction after finding the evidence of two predicate offenses to be insufficient, although other predicate offenses existed for which the evidence was sufficient.[1] The decision in *Brown* necessarily implies that a trial jury and a court of appeal cannot rely on predicate offenses for which the defendant is acquitted to support a RICO conviction.[2]

The Second Circuit has taken internally inconsistent approaches to this question. In *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975) the court found that a RICO conviction could stand so long as the evidence were sufficient on any two charged predicate acts. Five years later, in *United States v. Huber*, 603 F.2d 387, 399 (2d Cir. 1979) the court retracted from that earlier statement.[3] In a

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[1]Brown thus applied the rule recognized by the Ninth Circuit in normal conspiracy cases, which requires the reversal of a conspiracy count if it is found that one of the objects of the conspiracy was not legally recognizable. See *United States v. Kaye*, No. 81-1524, decided November 22, 1982.

[2]See also *United States v. Dansker*, 537 F.2d 40, 52 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 92 S.Ct. 732, 50 L.Ed.2d 748 (1977); *United States v. Pray*, 452 F.Supp. 788, 801 (M.D.Pa. 1978).

[3]In discussing the applicability of *United States v. Brown, supra*, the court stated "We need not decide whether this Circuit would agree with that analysis, *cf., United States v. Parness, supra*, 503 F.2d at 438 ('convictions on any two of these [travel fraud] counts were sufficient under Section 1961(5) to establish the "pattern of racketeering activity" necessary for a conviction under Section 1962(b)') because the evidence was sufficient to sustain all the mail fraud counts submitted to the jury."

later decision, the court took a somewhat confusing approach in attempting to distinguish *Brown*. *United States v. Weisman*, 624 F.2d 1118, 1124-25 (2d Cir. 1980), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209 (1980).[4]

The confusion expressed by these cases is indicative of the need for clarification by this court of an issue which is central to the continued effectiveness of the RICO statute and the protection of the rights of criminal defendants charged with RICO.

2. The need for review by this court is heightened by a separate substantial error in the reasoning of the court below which interrelates with the problem discussed above, and which places the Ninth Circuit at odds with this court and most Circuit Courts of Appeals in its analysis of the fundamental elements of a RICO conspiracy charge.

The trial jury was instructed, in essence, that, with regard to the RICO conspiracy, it should determine whether a conspiracy existed to commit the *predicate offenses*.[5] The opin-

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[4]*Weisman* involved a conviction on two conspiracy charges and various substantive offenses, all of which were objects of the conspiracies. The conspiracy counts and the substantive offenses were all RICO predicates. After deciding that the conspiracy count could appropriately be considered as RICO predicates, the court concluded that even if it erred in that regard, the conviction on the remaining substantive counts were sufficient to support the RICO conviction. It distinguished *Brown* on the grounds that the substantive counts reversed in *Brown* were not part of the charged conspiracies.

[5]The initial instructions given the jury regarding Count I were standard conspiracy instructions given under Title 18, U.S.C. Section 371. An additional charge, objected to by the defense, was as follows: "With regard to Count I, ladies and gentlemen, it must be proved beyond a reasonable doubt that a defendant conspired to commit any two of the racketeering acts that comprise the pattern of racketeering activities set out in the indictment . . . . In addition it must be proved beyond a reasonable doubt that during the course of the charged conspiracy, first, that the defendant was employed by or associated with an enterprise quote unquote as defined in these instructions, second, that at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, and that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern and not merely a series of disconnected acts. That through the commission of two or more connected — third, that through the commission of two or more connected offenses, the defendant conducted or participated in the conduct of the enterprise."

ion below found that the instructions accurately described the elements of a Section 1962(d) offense. Slip Opinion pp. 24-27.[6] That decision is clearly incorrect and conflicts with decisions in other Circuits as well as previous decisions of the Ninth Circuit.[7]

The instructions of the trial court, as ratified by the opinion below, denied the petitioner his right to jury consideration of each element of the offense. In addition, the net effect of the instruction was to induce the otherwise contradictory verdicts between the RICO and predicate offenses. The jury apparently believed that the RICO charge could be proved by a *conspiracy* to commit the substantive offenses, although no substantive violations occurred. Under the instructions actually given, this result would have been appropriate.

3. The final, but by no means least significant, area requiring review by this court involves the admission into

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[6]The opinion below analyzed the instructions as follows: "The instructions given here required each defendant to agree to participate in two specific racketeering acts, even on Count I. The term 'enterprise' was defined and the jury told they must find that each defendant was employed by or associated with a racketeering enterprise, and that the racketeering offenses were connected by a common scheme, plan, or motive so as to constitute a pattern 'and not merely a series of disconnected acts.' They were also told they must find 'through the commission of two or more connected offenses the defendant conducted or participated in the conduct of the enterprise.' These instructions were adequate to inform the jury of the elements of a RICO conspiracy, and required them to find an overall conspiracy to conduct an enterprise through a pattern of racketeering. . . ." Nowhere, however, was there an instruction on the need to find an agreement to participate in the affairs of the enterprise.

[7]See for example, *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980); *United States v. Bright*, 630 F.2d 804, 822, n.34 (5th Cir. 1980); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978); and *United States v. Zemek*, 634 F.2d 1159, 1170, n.15 (9th Cir. 1980): "The essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering."

evidence of statements allegedly made by petitioner to agents of the FBI before the return of the indictment. The question presented involves the effect of promises of immunity or confidentiality upon statements obtained from criminal suspects, an issue which has provided contradictory results and found diverse solutions.

According to agents who testified at the petitioner's trial, petitioner had conversations with FBI agents from time to time between 1969 and 1976. During these conversations it was "understood" that if petitioner helped the FBI his cooperation would be kept "confidential."

In mid-October, 1976 the petitioner received a federal grand jury subpoena. That subpoena had been issued by the FBI as a plan to "cultivate" the petitioner as an informant. True to the FBI's expectations, petitioner sought assistance with the subpoena. A meeting between the petitioner and two agents was arranged. In the two and a half to three hour conversation that followed, petitioner purportedly admitted being the temporary boss of the Los Angeles family of the La Cosa Nostra, acknowledged the position of other persons within the organization, and admitted attending a meeting at which James Fratianno, later a government witness, asked for and received permission to "shake down pornographers."

The petitioner was told that if he cooperated any information he provided would not be used against him, but that any independent evidence of wrongdoing developed by the FBI could be used to prosecute him.

The agent later that day sent a teletype to Washington which spoke of Dragna's "cooperation" in that conversation.

In the face of an understanding of confidentiality, the government introduced these highly incriminating statements against Dragna.

The court below disposed of this argument in summary fashion with the somewhat cryptic remark that "statements made in confidence are not immune, absent an unconditional promise of confidentiality" [Slip Opinion p. 13], citing *Matter of Wellins*, 627 F.2d 969, 972 (9th Cir. 1980). It rejected the petitioner's contention that the grand jury subpoena was a "ruse designed to cultivate him as an informant", opining that no evidence was offered on this point, although the FBI agent testified that that was the purpose of the subpoena.

In any event, such promises of immunity or confidentiality have been honored by various federal courts, including the Ninth Circuit. Despite the citation by the court below to *United States v. Wellins*, the opinion below conflicts with *Wellins*. *Wellins*, in fact, recognized the binding natures of promises of confidentiality. See also *Matter of Doe*, 410 F.Supp. 1163 (E.D. Mich. 1976). Similar promises have been recognized by the Fifth Circuit [*United States v. Weiss*, 599 F.2d 730 (5th Cir. 1970)] and previously by the Ninth Circuit [*United States v. Garcia*, 519 F.2d 1343 (9th Cir. 1975)].

The "Dragna statements" were perhaps the most telling evidence against petitioner, whose alleged participation in the schemes under consideration was only proved by the most vague and circumstantial evidence. The need for clarification of the ability of government agents to induce such statements with promises of confidentiality or immunity, and to thereafter renege on that agreement requires immediate consideration by this court.

Conclusion.

The petition for writ of certiorari should be granted.

Dated: December 15, 1982.

Respectfully submitted,

WEITZMAN, FIDLER & RE,
HOWARD L. WEITZMAN,
DONALD M. RE,
Attorneys for Petitioner.

APPENDIX A.

Opinion of the Court of Appeals.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Dominic Phillip Brooklier, Samuel Orlando Sciortino, Louis Tom Dragna, Michael Rizzitello, and Jack Locicero, Defendants-Appellants.

D.C. No. CR 79-126(A). C.A. Nos. 81-1045, 81-1046, 81-1047, 81-1048, 81-1049 (Consolidated).

Filed: September 3, 1982.

Appeal from the United States District Court for the Central District of California. Terry J. Hatter, Jr., District Judge, Presiding.

Argued and Submitted: January 5, 1982.

Decided:

Before: KENNEDY and SCHROEDER, Circuit Judges, and SOLOMON,* Senior District Judge.

PER CURIAM:

Appellants are members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking. They appeal their convictions for violating the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1962 and the Hobbs Act, 18 U.S.C. §§1951(a) and 2.

At a seven-week trial, the government showed that beginning in 1972, members of the Los Angeles "family" extorted money from pornographers and bookmakers.

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*Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Among their targets were Sam Farkas, Theodore Gaswirth, and Reuben Sturman. They also obtained money from Forex, an FBI-operated pornography business.

Much of the evidence consisted of testimony by extortion victims, including the FBI agents who ran the Forex operation. Aladena "Jimmy the Weasel" Fratianno, an FBI informant, described the internal organization and operations of La Cosa Nostra as an ongoing enterprise engaged in racketeering. Fratianno gave details on meetings, orders, and actions of the entire organization, including plans to murder Frank Bompensiero, an informant. He linked the individual acts of extortion to the leaders of La Cosa Nostra.

The indictment charged Brooklier, Sciortino, Dragna, Locicero, and Rizzitello (appellants) with racketeering in violation of RICO,[1] extortion,[2] obstruction of jus-

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[1]18 U.S.C. §1962(c) & (d) provide:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

"Enterprise" and "pattern of racketeering activity" are defined in 18 U.S.C. §1961(4), (5):

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

[2]18 U.S.C. §1951 provides, in part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of

tice,[3] and aiding and abetting.[4]

Count 1 charged all five appellants with conspiracy to commit RICO; the jury convicted all except Sciortino on this count. Count 2 charged all the appellants with a substantive violation of RICO; the jury convicted all of them. Count 3 charged that all appellants extorted money from Theodore Gaswirth and from his pornography business; all of the appellants were acquitted on this count. Count 4 charged appellants Rizzitello and Locicero with extorting money from Forex; the jury convicted both of them. Count 5 charged Brooklier, Sciortino, and Dragna with obstruction of justice through the murder of Frank Bompensiero, an informant; the jury acquitted all of them on this count.

Most of the issues raised on appeal challenge the racketeering acts on which the RICO convictions are based. The

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actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

[3]18 U.S.C. §1510 provides, in part:

"Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

[4]18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

convictions on Count 1 are based on the racketeering activities charged in Counts 3, 4, and 5, and the extortion from Reuben Sturman and the Sovereign News Company in Cleveland, Ohio. The convictions on Count 2 are based on the same activities as Count 1 and the extortion of money from San Farkas in Los Angeles, California. The RICO counts allege that each of the defendants has engaged in, or conspired to engage in, at least two acts of "racketeering," as that term is defined by 18 U.S.C. §1961(1).

I.

DOUBLE JEOPARDY

In 1974, Dominic Brooklier and Samuel Sciortino were indicted for RICO violations. The indictment included a charge that in 1973, they conspired to conduct an extortion ring. One specific charge alleged that they conspired to extort money from Sam Farkas, and several specific acts by which they extorted money from Farkas were cited. In April, 1975, based on a plea agreement, Brooklier and Sciortino pleaded guilty to this conspiracy count; the other counts were dismissed.

In 1978, Brooklier and Sciortino were again indicted. Count 2 of the new indictment charged a RICO violation, but unlike the 1974 indictment, they were charged with a violation of a different subsection.[5] Although most of the charges in the 1980 indictment refer to acts which occurred after the 1975 conviction, one of the acts was the same act set forth in the 1974 indictment to which those appellants

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[5]The 1974 indictment charged these appellants under 18 U.S.C. §1962(d), which makes it unlawful to engage in a conspiracy to conduct an extortion ring. The 1980 indictment charges the appellants with violation of 18 U.S.C. §1962(c), which makes it unlawful to participate in an enterprise affecting interstate commerce through a pattern of racketeering activity.

pleaded guilty. It charged they "extorted and caused the extortion of United States currency from Sam Farkas."

Brooklier and Sciortino moved to dismiss the Farkas incident in Count 2 on the ground of double jeopardy. The district Court denied the motion and appellants filed an interlocutory appeal. This court affirmed the district court and held under *Blockburger v. United States*, 284 U.S. 299 (1932), there was no double jeopardy. *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1980).

Although we have discretion to modify this interlocutory decision, *see United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1980), we decline to do it. *Blockburger* permits the government to charge the defendants with two or more offenses arising from the same transaction when the offenses have distinct elements. Under *Blockburger*, if appellants had not been indicted and convicted in 1974, the government in the 1980 indictment could have charged Brooklier and Sciortino with both conspiracy to violate RICO and with a substantive RICO offense both partly based on the Farkas extortion. Therefore, their prior convictions on a RICO conspiracy charge, which contained the Farkas extortion, do not bar conviction for a substantive RICO violation based partly on the same Farkas extortion. *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied, sub nom. England v. United States*, 444 U.S. 1020 (1980).

The double jeopardy challenge is rejected.

II.
THE 1975 PLEA AGREEMENT

Brooklier and Sciortino contend the 1975 plea agreement prevents the government from including the Farkas extortion in any subsequent indictment. The government, on the other hand, contends the plea agreement was limited to the abatement of pending and planned federal or state investigations

and charges. The district court agreed with the government's interpretation of the plea agreement.

The findings of a district court on the meaning of a plea agreement are reviewable under the "clearly erroneous" standard. *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980). We have examined the record and are of the opinion the district court's interpretation of the plea agreement is reasonable and is not clearly erroneous.

There is no merit to appellants' contention that the 1980 indictment should be dismissed because it was obtained in violation of the government's policy against multiple prosecutions for the same transactions. *Petite v. United States*, 361 U.S. 529 (1960). The *Petite* doctrine relates to the Justice Department's internal position that successive indictments will not ordinarily be based on the same conduct in order to avoid unnecessary multiple prosecutions. Except in extraordinary circumstances, it is a policy not reviewable by the courts. *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979); *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842 (1978).

III.
VINDICTIVE PROSECUTION

The 1978 indictment, which did not mention the Farkas extortion, was dismissed on motion of the appellants because of voting irregularities in the grand jury. In the subsequent indictment, the Farkas extortion was added in Count 2.

Brooklier and Sciortino contend the addition of the Farkas extortion in the subsequent indictments violates the vindictiveness doctrine. The doctrine of presumed vindictiveness applies when the Government increases the severity of the charges against the defendant under circumstances

that pose a "realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." *United States v. Gallegos-Curiel*, No. 81-1258, slip op. at 3230, 3234-35 (9th Cir. July 21, 1982). Here, the 1978 indictment was replaced by an indictment containing fewer charges and lighter penalties. The vindictiveness doctrine does not apply. *United States v. Rosales-Lopez*, 617 F.2d 1349, 1357 (9th Cir. 1980).

Even if the addition of the Farkas extortion somehow subjected Brooklier and Sciortino to a greater risk of punishment, vindictiveness could not be presumed. No reasonable likelihood of vindictiveness arises when the prosecutor increases the charges prior to trial, because he "may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." *United States v. Goodwin*, 102 S. Ct. 2485 (1982). The prosecutor's initial charging decision should not freeze future conduct and the Government may reevaluate the societal interest in prosecution prior to trial, *id*, at 12-13; *Gallegos-Curiel*, slip op. at 3235-37, especially when, as here, "the prosecutor is required by court order to obtain a new indictment" and thus "will *necessarily* have to review the evidence and reconsider what charges to present to the grand jury." *United States v. Banks*, slip Op. at 3443, 3447 (9th Cir. July 29, 1982) (emphasis in original). The district court correctly dismissed the appellants' vindictive prosecution claim.

IV.

DEFENDANTS' RIGHT TO TESTIFY

Brooklier and Sciortino contend the Farkas extortion charge precluded them from testifying in their own defense because their 1975 guilty pleas would have required them

to admit their participation in the Farkas extortion based on the 1975 guilty plea.

This contention is incorrect. They accepted sentencing under *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), and did not admit their guilt. They only consented to the imposition of the penalty for that count. They could have testified to their reasons for entering into the 1975 plea agreement.

Appellants' decision not to risk cross-examination was purely tactical. Among other reasons, they wanted to avoid impeachment by evidence of prior convictions. "The constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging constitutional rights." *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980).

The Farkas extortion charges was properly included in the 1980 indictment.

V.

AMBIGUITY OF THE INDICTMENT

Appellants contend that Count 1 of the indictment, which charges defendants with a RICO conspiracy, contains ambiguous and legally impossible pleadings. They assert that the racketeering activities set forth in Count 1 include conspiracy charges, and that a "conspiracy to conspire" to commit acts of extortion is an illogical and ambiguous allegation.

The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering. 18 U.S.C. §1962(c); *United States v. Zemek*, 634 F.2d 1159, 1170 N.15 (9th Cir. 1980). A "pattern of racketeering activity" is expressly defined as

at least two acts of racketeering activity. 18 U.S.C. §1961(5).

Conspiracies or attempts can serve as the underlying racketeering activities because 18 U.S.C. §1961(1)(B) defines "racketeering activity" as including those offenses indictable under 18 U.S.C. §1951. Section 1951, in turn, makes punishable attempts or conspiracies to obstruct, delay, or affect commerce by robbery, extortion or physical violence.

Thus, the statutory language of sections 1962, 1961 and 1952 allows for the indictment as written. A series of conspiracies and failed attempts constitutes a "pattern of racketeering activity" within the meaning of 18 U.S.C. §1961(5), even if no racketeering offense is completed. The district court in its instructions adequately explained these distinctions. In addition, appellants have failed to show that this so-called ambiguity has prejudiced them.

VI.

FAILURE TO DISMISS THE FOREX EXTORTION CHARGE

Count 4 charges the appellants with an attempt and conspiracy to extort money from Forex, the undercover business operated by FBI agents. The Forex activities are among the racketeering acts supporting the RICO violations in Counts 1 and 2.

Two of the Forex extortion payments were made in California and the third in Nevada. Appellants contend that the California payments provide no basis for federal jurisdiction under the Hobbs Act, 18 U.S.C. §1951. They assert a lack of nexus with interstate commerce, because the FBI business was a fiction, and had no actual or potential effect on interstate commerce. They also contend that the Nevada payment did not meet jurisdictional requirements because the federal agents demanded payment in Nevada for the sole purpose of manufacturing jurisdiction.

Judge Pregerson, then a district judge, rejected these contentions on the ground that factual impossibility is no defense to an inchoate offense. *United States v. Brooklier*, 459 F.Supp. 476 (C.D. Cal. 1978). His analysis has now been adopted by this court, *United States v. Bagnariol*, 665 F.2d 877, 895-96 (9th Cir. 1981), as well as the Third Circuit in *United States v. Jannotti*, 673 F.2d 578, 592-94 (3d Cir. 1982) (en banc), *pet. for cert. filed*, 50 U.S.L.W. 3961 (June 8, 1982), which held that an actual potential effect on interstate commerce was not a jurisdictional prerequisite for a conviction of conspiracy to violate the Hobbs Act.

Appellants also contend that the federal agents "manufactured jurisdiction" by requiring payment in Nevada. They rely on *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973), in which agents placed telephone calls from another state in order to transform a local bribery into a federal crime. Here, both the appellants and federal agents engaged in activities of an interstate character. Jurisdiction had already been established by the nature of the activities themselves.

We hold there was sufficient nexus with interstate commerce to satisfy federal jurisdictional requirements.

VII.

DIVISIBILITY OF FOREX EXTORTION PLAN

Defendants contend that the Forex extortion, consisting of three separate payments, is really a single offense which the FBI extended over a period of time in order to satisfy the "pattern of racketeering" requirement under the RICO statute.

In *United States v. Tolub*, 309 F.2d 286, 289 (2nd Cir. 1962), the court held that each acceptance of payment by the defendant during the period of an extortion scheme con-

stituted a separate act of extortion. *See also, United States v. Addonizio*, 451 F.2d 49, 59-60 (3rd Cir.), *cert. denied*, 405 U.S. 936 (1972). Here, each payment resulted from appellants' initial threats in an ongoing extortion scheme and each payment was a separate act of racketeering within the meaning of 18 U.S.C. §1961(1).

VIII.

ADMISSION OF DRAGNA'S ORAL STATEMENTS

From 1969 until 1976, Dragna had a number of conversations with FBI Agent John Nance in which Nance attempted to develop Dragna as an informant. In 1976, Dragna was subpoenaed to appear before a federal grand jury. Dragna called Nance for help. Nance told Dragna that if he cooperated, their conversations might be kept confidential. The time for appearance was continued, but Dragna was not promised immunity. Dragna's statements during his conversations with Nance were admitted at trial.

To protect the voluntariness of a waiver of Fifth Amendment rights, the government must keep its promise of immunity. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 347 (1963). However, the mere threat of a grand jury subpoena for failure to cooperate does not constitute an offer of immunity. Statements made in confidence are not immune absent an unconditional promise of confidentiality. *See Matter of Wellins*, 627 F.2d 969, 972 (9th Cir. 1980). The district court found that there was no binding agreement, and that the statements were admissible against Dragna. We agree.

Dragna's contention that he was deprived of his Fourth Amendment rights because the Grand Jury subpoena was a "ruse designed to cultivate him as an informant" has no merit. No evidence was offered to support this contention. *Dunaway v. New York*, 442 U.S. 200 (1979), the case

Dragna cites in support of that contention, considered whether a confession is admissible when police took the defendant into custody, and detained and interrogated him when there was no probable cause to arrest. Here, there was no detention or custodial interrogation.

Dragna also asserts that the statements were involuntary because he was influenced by threats of a Grand Jury investigation and promises of confidentiality. The record shows that there was no coercion or threats, and that Dragna was warned to be careful of what he said. The methods used were constitutionally permissible.

IX.
BRUTON OBJECTIONS

Dragna, in his statement to Nance, admitted he was "acting" boss of the Los Angeles La Cosa Nostra family, and he named all the other appellants as members of the family. The names of the other appellants were deleted from his statement and the jury was instructed that Dragna's statement could only be considered against him.

Dragna did not testify. Nevertheless, through other witnesses, the jury learned Brooklier and Sciortino were in prison at the time. Brooklier and Sciortino contend that Dragna's statement that he was the acting boss compels the inference that he was acting in place of Brooklier and Sciortino, and that a severance was necessary under *Bruton v. United States*, 391 U.S. 123 (1968).

The district court properly denied the motion to sever. Even if the edited statement hinted that Brooklier and Sciortino were members of the Los Angeles family, this inference was not sufficiently incriminating to require severance, because both sides stipulated and told the jury that mere membership in La Cosa Nostra was not unlawful. Courts need not grant a *Bruton* severance unless the statements of the

non-testifying defendant clearly inculpate his codefendants. *E.g., United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir. 1978). As in *United States v. Wingate*, 520 F.2d 309, 314 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976), it is "[o]nly when combined with considerable other evidence, which amply established [Brooklier and Sciortino's] guilt, [that] the statements tend to implicate [them]."

X.

ADMISSION OF FRATIANNO'S PLEA AGREEMENT

During the trial, defense counsel referred to government witness James Fratianno as a perjurer, paid informant, and murderer who escaped the death penalty by cooperating with the FBI, and whose book sales would be enhanced by a conviction. In rebuttal, the government introduced Fratianno's plea agreement, which required Fratianno to testify truthfully. Appellants contend that under *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), this evidence permitted the government to improperly vouch for Fratianno's credibility.

Although, as the court in *Roberts* pointed out, plea agreements are admissible on the issue of bias, they are not to be used as a basis for supporting the truthfulness of the witness' testimony. In *Roberts*, the United States Attorney argued to the jury that a government witness testified truthfully because he was afraid of violating his plea agreement, and that the government, to ensure he would testify truthfully, placed a detective in court when the witness testified. We reversed the conviction primarily because the statement that the detective was monitoring the witness improperly referred to facts outside the record. Here, no such argument was made. In fact, whenever the plea agreement was mentioned during the trial, the court cautioned the jury that the agreement requiring the witness to testify truthfully did not

mean that the testimony was in fact truthful. The court also told the jury that the government could not vouch for the truth of the testimony and that the jurors were the sole and exclusive judges of the credibility of all witnesses. These instructions adequately dispelled any suggestion of vouching.

XI.

STURMAN EXTORTION: UNCORROBORATED ACCOMPLICE TESTIMONY

Appellants contend Fratianno's testimony was insufficient as a matter of law for the jury to find that the appellants attempted to extort money from Reuben Sturman, because Fratianno was an accomplice and his testimony was uncorroborated. Fratianno testified at length on many subjects and he was thoroughly cross-examined. His testimony in other areas was corroborated in many details. There was adequate evidence to satisfy the rule of *United States v. Sigal*, 572 F.2d 1320, 1324 (9th Cir. 1978), that the uncorroborated testimony of an accomplice is sufficient to support a conviction so long as it is not incredible or unsubstantial on its face.

We hold Fratianno's testimony meets this standard and is adequate to support the RICO convictions based on the Sturman extortion charge.

XII.

ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS

Fratianno testified he told Tony Delsanter and Leo Moceri that Brooklier and Sciortino wanted them to extort money from Reuben Sturman, a dealer in pornography. Fratianno also testified that Delsanter later reported that he and Moceri had done the job. Delsanter introduced Fratianno to Glenn Pauley, the man who had "grabbed" Sturman. This testimony was the only link connecting Brooklier and Sciortino

to the Sturman extortion attempt. Neither Delsanter nor Moceri testified.

Brooklier and Sciortino contend that the statements made by Delsanter and Moceri were inadmissible hearsay because the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E), requires the declarant's involvement in the conspiracy to be corroborated by independent evidence. *United States v. Snow*, 521 F.2d 730, 733 (9th Cir. 1975).

Once the conspiracy was shown to exist, only slight evidence was required to support a finding that Delsanter and Moceri were part of the conspiracy. *United States v. Calaway*, 524 F.2d 609, 612 (9th Cir. 1975).

Here, there was ample evidence that a conspiracy did exist and that Dragna, Brooklier, Sciortino, Frantianno and others were members of it. Fratianno testified that Brooklier and Sciortino, with the approval of Dragna, the top man, directed Fratianno to go to Cleveland, meet with Delsanter and Moceri, and get them to arrange to shake down Sturman. Fratianno testified that he went to Cleveland and met with Delsanter and Moceri and brought them the message. Thereafter, they told Fratianno that they had done the job through Glenn Pauley, to whom they introuced Fratianno. Sturman later identified Glenn Pauley as the man who attempted to extort money from him.

In determining whether Delsanter and Moceri were part of the conspiracy, we treat testimony on their statements as independent evidence of their participation. We consider their statements not for their truth, but as verbal acts to show involvement. *Calaway*, 524 F.2d at 613. The court in *Calaway*, after setting forth the test for admissibility of hearsay statements of co-conspirators, stated:

> In considering this question, we treat testimony by witnesses about statements made by [the alleged con-

spirators] as part of the independent evidence of their participation in the conspiracy. Such statements by them are not received to establish the truth of what they said but to show their own verbal acts.

Delsanter's statement indicates that he and Moceri were aware of the scope and purpose of the extortion conspiracy, and that they agreed with those goals. This evidence is sufficient to link Delsanter and Moceri to the conspiracy.

The district court correctly admitted the statements of Delsanter and Moceri under the co-conspirator exception to the hearsay rule.

XIII.
COUNTS 1 & 2: SUFFICIENCY OF EVIDENCE TO CONVICT DRAGNA

Dragna argues that there was insufficient evidence to connect him to the Sturman and Forex extortions. He points out that the jury acquitted him on the Gaswirth extortion and on the obstruction of justice charges. He argues that this leaves no underlying racketeering acts for his RICO convictions.

Inconsistent verdicts do not require reversal unless there is insufficient evidence to sustain the guilty verdict. *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979); *Dunn v. United States*, 284 U.S. 390, 393 (1932).

The evidence was sufficient to convict Dragna on both the RICO conspiracy and RICO substantive counts. The evidence showed that Fratianno acted as Dragna's agent in making arrangements for the Forex extortions. Dragna retained ultimate control over the Los Angeles La Cosa Nostra and he instructed Frank Bompensiero to make money for the family. He planned and agreed to Bompensiero's murder and he approved of the plans to shake down Sturman and

Gaswirth. Dragna was to benefit from all of these operations.

Considered in the light most favorable to the verdict, the evidence and the inferences drawn from the evidence were sufficient to sustain Dragna's convictions on both counts. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

XIV.

SUFFICIENCY OF EVIDENCE TO CONVICT BROOKLIER AND SCIORTINO

Brooklier and Sciortino contend that their convictions under Count 2, a substantive RICO count, must be reversed because there was insufficient evidence of their involvement in the Forex extortions. The United States Attorney, in his closing argument, conceded that Brooklier and Sciortino were not involved in those extortions.

In *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), the court held a RICO conviction which is based on the same act upon which a non-RICO substantive count is based, must be reversed if the conviction on that substantive count is reversed. The court reasoned that this result is necessary because it would be impossible to determine whether the jury relied on an impermissible underlying offense to reach its verdict on the RICO count.

However, in this case, even if the evidence of the Forex extortion was insufficient, the error in allowing the charges to go to the jury along with the other four charges of extortion was harmless beyond a reasonable doubt. It is harmless because the United States Attorney told the jury that Brooklier and Sciortino were not involved in the Forex extortions and that the Forex extortions should not be considered in determining the guilt or innocence of Brooklier and Sciortino.

Brooklier also contends that his acquittals on other counts compel the conclusion that the jury relied solely on the Sturman extortion in convicting him on the RICO conspiracy count. Although at least two acts of racketeering are necessary to convict a defendant of a substantive RICO offense, it is unnecessary in a conspiracy to commit RICO to show that a particular defendant personally committed any act of racketeering.[6] We, therefore, hold that the conviction of Brooklier on the conspiracy count (Count 1) must be affirmed regardless of whether he personally committed any act of racketeering, even though we find that the evidence amply supports a finding that Brooklier did, in fact, commit at least two acts of racketeering.

Appellants also contend that the district court erred in denying their Rule 14 pretrial severance motion because Brooklier, Sciortino and Dragna were not charged under Count 4, the Forex extortion count. This contention has no merit. The Forex extortion evidence was relevant because Brooklier and Sciortino remained members of La Cosa Nostra during the time the Forex extortions were committed by co-conspirators. It was also relevant because the Forex extortion activity became the motive for killing Bompensiero, an act for which Brooklier and Sciortino were indicted in Count 5.

We therefor reject the contention of Brooklier and Sciortino that their convictions must be reversed for lack of sufficient admissible evidence to convict. We also hold that the district court did not abuse its discretion in denying the severance motion.

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[6]For an excellent discussion of this issue, see the statement of Chief Judge Owen in *United States v. Hawkins*, 516 F. Supp. 1204, 1208 (M.D. Ga. 1981).

XV.

ELECTRONIC SURVEILLANCE: REQUIREMENT OF A SUPPRESSION HEARING

Before trial, Brooklier moved to suppress a tape recording of his conversation with Fratianno on an extortion plan. Brooklier contends that the court order authorizing the electronic surveillance was issued on the basis of an affidavit which failed to set forth a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed,"as required by 18 U.S.C. §2518(1)(c).

Brooklier asserts that Fratianno was a paid government informant who could have infiltrated the individuals under investigation, and that electronic surveillance was therefore unnecessary. He further asserts that the government's application for the surveillance failed to include the fact that Fratianno was a paid informant.

The district court, without holding a hearing, denied Brooklier's motions to suppress. The tape was played to the jury.

The government contends that there was no need to set forth the information about Fratianno because when the conversation with Brooklier was taped, Fratianno was still under investigation. He did not become fully cooperative until later.

The fact that the government doubted whether Fratianno was fully cooperative did not relieve it of the obligation to set forth those facts. It was for the court to determine its materiality.

In *Franks v. Delaware*, 438 U.S. 154, 155-6 (1978), the Supreme Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and

> intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probably cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

The court also held that if the hearing showed the false statement to be material, the evidence must be suppressed.

In *Franks*, a search warrant was issued based on an affidavit containing deliberate misstatements. Here, although the problem is one of omission rather than misstatement, the initial burden for purposes of obtaining a hearing remains on the defendant. The defendant must show that the omission was deliberate or made in bad faith. Brooklier has demonstrated no more than negligence on the Government's part. Mere negligence in preparing the affidavit for a wiretap order is not sufficient to suppress the evidence obtained. *Id.* at 170.

Although the government should have included information required by the wiretap statute, 18 U.S.C. §2518(1)(c), we hold the district court, in failing to hold a hearing and in admitting the tape in evidence, did not commit error because there was no evidence of deliberate omission in the government's affidavit.

XVI.
JURY INSTRUCTIONS

Appellants contend that the jury was improperly instructed on the elements of a conspiracy to commit RICO. They assert that the jury was instructed to convict if they found multiple conspiracies to commit two or more acts of racketeering even though no overall conspiracy existed.

The instructions which the court gave on this issue were jointly drafted by counsel for both the government and the

appellants. Later, in response to a question from the jury, appellants objected to a clarifying instruction proposed by the government. They asked that no additional instructions be given because the previous instruction, based on a Blackmar & Devitt instruction, was clearer than the tendered one, and had "proved to be true and useful over the years." Later, the court, in response to another inquiry from the jury, told them:

> Each individual has to have knowledge of two or more racketeering acts and been a part of and committed those, and as part of those it could be conspiracies to commit those racketeering acts.

Although the instructions on this issue were not models of clarity, any ambiguity was harmless to appellants and actually favored them.

The purpose of the RICO statute is to allow a single prosecution of persons who engage in a series of criminal acts for an enterprise, even if different defendants perform different tasks or participate in separate acts of racketeering. The same persons need not commit or endorse the same acts of racketeering. It is sufficient if a defendant who participates in an enterprise through a pattern of racketeering knows that the enterprise operates by a pattern of racketeering. The pattern may be established by showing two or more acts that constitute offenses, conspiracies, or attempts of the requisite type, as long as the defendant committed two of the acts and both of them were connected by a common scheme, plan or motive.

In addition, it is a crime to conspire to commit the substantive RICO offense. 18 U.S.C.A. §1962(d) (Supp. 1982). This overall conspiracy requires the assent of each defendant who is charged, although it is not necessary that each conspirator knows all of the details of the plan or

conspiracy. *United States v. Elliott*, 571 F.2d 880, 900-05 (5th Cir.), *cert. denied*, 439 U.S. 993 (1978).

Conspiracy to carry on an enterprise through racketeering, section 1962(d), is a separate crime from the participation in an enterprise through racketeering acts such as conspiracy or attempts, section 1962(c). The distinction between a conspiracy to violate the RICO statute, and a conspiracy or attempt committed as part of a pattern of racketeering activity, depends on the time the conspiracy is formed and its objective. If the agreement or combination is undertaken to establish or participate in an enterprise and to do it through a pattern of racketeering, there is a conspiracy to commit the underlying RICO offense. If the enterprise is in existence and it is aided by attempts or conspiracies of the kind proscribed by the statute, such attempts or conspiracies may be part of the pattern of racketeering.

The instructions given here required each defendant to agree to participate in two specific racketeering acts, even on Count 1. The term "enterprise" was defined and the jury told that they must find each defendant was employed by or associated with a racketeering enterprise, and that the racketeering offenses were connected by a common scheme, plan, or motive so as to constitute a pattern "and not merely a series of disconnected acts." They were also told they must find "through the commission of two or more connected offenses the defendant conducted or participated in the conduct of the enterprise." These instructions were adequate to inform the jury of the elements of a RICO conspiracy, and required them to find an overall conspiracy to conduct an enterprise through a pattern of racketeering activity before they could find appellants guilty.

To the extent the trial court's instructions can be interpreted to require that each defendant actually participate in two or more acts of racketeering in order to be guilty of

conspiracy to violate RICO under section 1962(d), the instructions posed an unnecessary burden on the Government that in no way prejudiced the appellants.

There is no merit in appellants' contention.

XVII.
JURY SELECTION

Before trial, appellants sought to excuse for cause four jurors who on voir dire stated they believed there existed an organization known as La Cosa Nostra whose members are engaged in organized crime. Appellants later exhausted all of their peremptory challenges, many of which were exercised against jurors who had no opinions about La Cosa Nostra. We reject the government's contention that this fact prevents appellants from challenging the district court's ruling. The defendants need not show actual prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965). Any error which impairs the exercise of peremptory challenges is reversible error. *United States v. Turner*, 558 F.2d 535, 538 (9th Cir. 1977).

Jurors need not be totally ignorant of the facts and issues involved. *Irvin v. Dowd*, 366 U.S. 717, 722 (1960). The court in *Irvin* noted:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict

> based on the evidence presented in court. [citations omitted]

Here, each of the jurors stated that he did not have an opinion on the guilt or innocence of the defendants, that he would keep an open mind, and that he would listen to the evidence on both sides and follow the court's instructions. They also said that they would then decide whether La Cosa Nostra exists, whether it operates in Los Angeles, and whether the defendants were members of it. On the basis of the evidence and the instructions, they would then decide whether each defendant was guilty of an offense charged in the indictment.

The trial court has broad discretion in its rulings on challenges for cause, and can only be reversed for an abuse of discretion. *Dennis v. United States*, 339 U.S. 162, 168 (1949). In *Dennis*, the Supreme Court affirmed the conviction of an admitted communist by a jury composed of government employees during a period of widespread anticommunist hysteria. Here, both sides stipulated to the jury that membership in La Cosa Nostra is not a crime. The jury was told that the government had the burden of proving that each appellant was knowingly associated with an enterprise engaged in a pattern of racketeering activity. No juror expressed an opinion before trial on whether any appellant was a member of La Cosa Nostra, or was guilty of any illegal act.

The district court did not abuse its discretion in refusing to dismiss the four jurors for cause.

AFFIRMED.

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Dominic Phillip Brooklier, Samuel Orlando Sciortino, Louis Tom Dragna, Michael Rizzitelio, and Jack Locicero, Defendants-Appellants.

Nos. 81-1045, 81-1046, 81-1047, 81-1048, 81-1049.

Filed: November 1, 1982.

Before: KENNEDY and SCHROEDER, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing. Judges Kennedy and Schroeder have voted to reject the suggestions for a rehearing en banc, and Judge Solomon has recommended rejection of the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc hearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for a rehearing en banc are rejected.

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C.

Order on Motion for Stay of Mandate. (Rule 41(b) Fed. R. App. P.)

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Dominic Phillip Brooklier, Samuel Orlando Sciortino, Louis Tom Dragna, and Michael Rizzitello, Defendants-Appellants.

Nos. 81-1045, 81-1046, 81-1047, 81-1048.

Filed: November 17, 1982.

Upon due consideration of the appellants' motions for stay of the mandate, it is ordered that the motions for stay are granted pending the filing, consideration, and disposition by the Supreme Court of the United States of a petition for writ of certiorari. This stay is conditioned on timely filing of the petition for writ of certiorari, and in all events said petition shall be filed in the Clerk's Office of the Supreme Court of the United States on or before December 16, 1982. If the petition for writ of certiorari is granted, this stay will continue pending final disposition of the case by the Supreme Court of the United States.

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D.

§1961. Definitions

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1510 (relating to obstruction of criminal investigations), . . . section 1951 (relating to interference with commerce, robbery, or extortion), . . .

. . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§1962. Prohibited activities

(a) . . .

(b) . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Office-Supreme Court, U.S.
FILED
JAN 31 1983
ALEXANDER L. STEVAS,

No. 82-1014

In the Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS TOM DRAGNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's RICO convictions are invalid because he was acquitted on substantive counts charging two of the predicate acts of racketeering and because he was not named in a substantive count charging a third predicate act of racketeering.

2. Whether the district court properly instructed the jury on the elements of a RICO conspiracy.

3. Whether petitioner's statements to FBI agents were properly admitted at trial.

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LOUIS TOM DRAGNA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 685 F.2d 1208.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24) was entered on September 3, 1982. A petition for rehearing (Pet. App. 25) was denied on November 1, 1982. The petition for a writ of certiorari was filed on December 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). He was sentenced to five years'

imprisonment and fined $50,000. The court of appeals affirmed (Pet. App. 1-24).

The evidence adduced at trial showed that between 1974 and 1978 petitioner was the acting boss of the Los Angeles family of La Cosa Nostra (R.T. 2851-2852, 2915, 2903-2931).[1] In May 1975, petitioner approved a plan, developed by James Fratianno[2] and co-defendants Dominic Brooklier and Samuel Sciortino, to extort money from pornographers Reuben Sturman and Teddy Gaswirth (R.T. 2923-2929, 2945-2947). At a June 1975 meeting, Fratianno informed petitioner of the progress made in the "shakedown" scheme, and petitioner asked Fratianno to suggest some ideas for killing Frank Bompensiero, because Bompensiero was "shooting his mouth off" (R.T. 2957-2959). A few days later, petitioner told Fratianno that he had decided to retire Tommy Palermo, the "consigliere" of the Los Angeles family, and replace him with Bompensiero in order to "relax" Bompensiero and make him easier to kill (R.T. 2959-2960). Thereafter, petitioner and Fratianno met on numerous occasions to discuss their scheme for "shaking down" pornographers; petitioner approved each "shakedown" and told Fratianno to report to him concerning everything he did (R.T. 3000-3002). During the fall of 1975 and winter of 1976, the "family" unsuccessfully attempted a "shakedown" of Reuben Sturman for $20,000 (R.T. 4424-4429). In August 1976, co-defendant Jack LoCicero, whom petitioner appointed to conduct the "shakedown" under Fratianno's supervision, unsuccessfully attempted to extort $20,000 from Teddy Gaswirth (R.T. 2716-2737).

During May 1976, the FBI opened an office in Van Nuys, California, for a fictitious company called Forex, which was purportedly engaged in exporting pornographic films

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[1]"R.T." refers to the Reporter's Transcript.

[2]Fratianno was the government's chief witness at trial.

to Mexico and South America (R.T. 4258-4272). Bompensiero then sought permission to "shake down" Forex, and his request was granted by Fratianno with petitioner's approval (R.T. 3048-3050). In August, co-defendant LoCicero and another man visited Forex and demanded "a piece of the action in order for Forex to remain in business * * *" (R.T. 4298). When asked if they were the "Mafia," LoCicero responded, "[n]o, we're a family" and "[w]e represent the people in Los Angeles" (R.T. 4320). At a later meeting, co-defendant Michael Rizzitello told the undercover agents involved in Forex that he wanted $20,000 up front and $500 a week; the figure was finally set at $5000 up front and $1000 a week (R.T. 4350-4352, 4507-4512). In all, the agents paid $7000 in "shakedown" money (R.T. 4358-4365, 4517-4525, 4383-4386, 4539-4542).

Petitioner and Fratianno devised several plans for murdering Bompensiero, but none proved successful (R.T. 3037-3047). After it was discovered that Forex was an undercover operation, petitioner and co-defendants Rizzitello, Brooklier, and Sciortino all agreed that Bompensiero was an informant and that he should be killed (R.T. 3052-3061). Bompensiero was subsequently murdered in a telephone booth to which he had been lured by a call from co-defendant Brooklier (R.T. 3081-3085).

ARGUMENT

1. Petitioner does not dispute the court of appeals' holding (Pet. App. 16-17) that the evidence was sufficient to establish his involvement in four of the racketeering acts charged in the RICO counts: the Sturman, Gaswirth, and Forex extortions, and the murder of Frank Bompensiero. However, petitioner contends (Pet. 3-5) that his RICO convictions are invalid because he was acquitted on the substantive counts charging the Gaswirth extortion (Count III) and the Bompensiero murder (Count V) and because he was

not named in the substantive count charging the Forex extortions (Count IV). Petitioner's claim is without merit.

Even eliminating from consideration the predicate acts relating to the substantive counts on which petitioner was acquitted, two predicate acts remain, i.e., the Forex and Sturman extortions. Those acts alone are sufficient to support petitioner's RICO convictions. The fact that petitioner was not named in the substantive count charging the Forex extortions certainly does not mean that those extortions could not be charged against him in the RICO counts as a predicate act of racketeering, and the indictment did so charge.

In any event, even if the only predicate acts supporting petitioner's RICO convictions were those that formed the basis of the substantive counts on which he was acquitted, the RICO convictions would survive. It is well settled that inconsistent verdicts rendered in the same proceeding do not require reversal. *Hamling* v. *United States*, 418 U.S. 87, 100-101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932). Instead, " '[e]ach count is separately considered,' " and, regardless of any inconsistency with another count, " 'if it is supported by the evidence, [it] may stand.' " *United States* v. *Lichenstein*, 610 F.2d 1272, 1279 (5th Cir. 1980), quoting *United States* v. *Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979). Here, the court of appeals found, and petitioner does not dispute, that despite the acquittals on the substantive counts, the evidence was sufficient to establish petitioner's participation in the Gaswirth extortion and Bompensiero's murder.

The Third Circuit's decision in *United States* v. *Brown*, 583 F.2d 659 (1978), does not support petitioner's argument. There, the court of appeals reversed a RICO conviction where the evidence, although sufficient to prove the commission of the requisite number of racketeering acts,

was insufficient to support two of the predicate acts charged in the indictment and submitted to the jury. The court reasoned that this result was required because it was impossible to determine whether the jury had relied on an impermissible underlying offense to reach its verdict on the RICO count. Whatever the merit of the decision in *Brown*, it is wholly distinguishable from this case. Here the evidence was sufficient to prove petitioner's participation in all the racketeering acts with which he was charged, and there was therefore no danger that the verdict rested upon predicate acts unsupported by the evidence.[3]

2. Petitioner contends (Pet. 5-6) that the district court improperly instructed the jury on the RICO conspiracy count. He alleges that the court failed to advise the jury that, in order to convict petitioner on that count, it must find that he agreed to participate in the affairs of an enterprise in addition to agreeing to commit the predicate acts of racketeering.

The challenged instruction was drafted jointly by attorneys for both sides, including counsel for petitioner, and it evoked no objection whatever. Accordingly, petitioner waived his right to challenge the instruction. Fed. R. Crim. P. 30. In any event, the court of appeals correctly rejected petitioner's claim.

With regard to the RICO conspiracy count, the district court instructed the jury as follows (Pet. 5 n.2):

> [I]t must be proved beyond a reasonable doubt that a defendant conspired to commit any two of the racketeering acts that comprise the pattern of racketeering

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[3]Nor is petitioner aided by *United States* v. *Weisman*, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980). In that case, the court of appeals held that it would have affirmed the defendant's RICO convictions even if two of the predicate acts of racketeering had been improperly charged, because several valid predicate acts remained.

> activities set out in the indictment * * *. In addition it must be proved beyond a reasonable doubt that during the course of the charged conspiracy, first, that the defendant was employed by or associated with an enterprise quote unquote as defined in these instructions, second, that at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, and that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern and not merely a series of disconnected acts. That through the commission of two or more connected--third, that through the commission of two or more connected offenses, the defendant conducted or participated in the conduct of the enterprise.

As the court of appeals concluded (Pet. App. 22), "[t]hese instructions were adequate to inform the jury of the elements of a RICO conspiracy, and required them to find an overall conspiracy to conduct an enterprise through a pattern of racketeering activity before they could find [petitioner] guilty."

Indeed, the RICO conspiracy instruction was more favorable to petitioner than the law requires in that it stated that to convict petitioner the jury must find that he *actually* "conducted or participated in the conduct of the enterprise [through the commission of two or more racketeering acts]" and not merely that he agreed to do so (Pet. 5 n.2).

3. In October 1976, petitioner was served with a subpoena in connection with a grand jury probe of the "shakedown" of the FBI Forex operation. On October 14, petitioner met at his own request with FBI Agents Jack Barron and John Nance. During the ensuing conversation, petitioner acknowledged, among other things, that he was acting boss of the Los Angeles family of La Costa Nostra (R.T.

4174) and that he had authorized the "shakedowns" of pornography businesses in Southern California (R.T. 4200). Petitioner contends (Pet. 6-8) that these admissions were improperly introduced at trial because they were obtained pursuant to promises of immunity or confidentiality. However, both of the courts below, after reviewing the record, found that no binding promises of confidentiality had been made (see Pet. App. 11). Those findings are not properly subject to further review (see *Berenyi* v. *Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967)), and in any event are not clearly erroneous.

Agents Nance and Barron both testified, at an in camera hearing on petitioner's motion to suppress his statements, that they had not promised petitioner immunity for his statements and that the subject of immunity was never even discussed (R.T. AA 300-301, 303, 309, 337, 359).[4] To the contrary, petitioner was told that he should be careful what he said because he was not being immunized (R.T. AA 301, 337). Petitioner's assertion (Pet. 7) that it was "understood" that his statement would be "confidential" misstates the record. The clear import of the agents' testimony was that if petitioner had ultimately cooperated with the FBI as an informant there might have been some basis for finding an "implied" understanding that his conversations would be kept confidential (R.T. AA 303, 309). But petitioner did not so cooperate.

Nor is there merit to petitioner's suggestion (Pet. 8) that the grand jury subpoena was a ruse designed to cultivate petitioner as an informant. To the contrary, Agent Barron testified that petitioner was subpoenaed as a possible witness against other La Cosa Nostra subjects (R.T. AA 348,

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[4]"R.T. AA" refers to those volumes of the Reporter's Transcript so designated.

4209-4213, 4224-4232). Likewise, Agent Nance testified that petitioner, as boss of an organized crime family, was presumed to have knowledge of the activities of his underlings that would be of use to the grand jury investigation (R.T. AA 315). There is simply no basis in the record for the conclusion that the subpoena was issued for an improper purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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